**STEMLIFE BHD**

**v.**

**BRISTOL-MYERS SQUIBB (M) SDN BHD**

HIGH COURT MALAYA, KUALA LUMPUR
AZMAN ABDULLAH JC
[ORIGINATING SUMMONS NO: S7-24-2340-2007]
30 JANUARY 2008

***CIVIL PROCEDURE:*** *Discovery - Pre-action discovery - Defamatory postings on defendant's website - Plaintiff sought for disclosure of information leading to identification of users - Whether defendant facilitated wrongdoing*

The plaintiff applied for pre-action discovery against the defendant for defamatory postings on the defendant's website and in an external blog linked to the defendant's web forum by two users of the forum operating under the pseudonyms "stemlie" and "kakalily". The plaintiff sought the identification of the said users and contended that the defendant should have the relevant information as the users were registered with the defendant and would have provided their particulars upon registration.

**Held (allowing the application):**

**(1)** In *Norwich Pharmacal Co. v. Customs and Excise Commissioners*, the claimant was allowed to seek disclosure from any party who had information identifying a wrongdoer so that an action can be brought against the wrongdoer where otherwise the claimant would not be able to do so. The benefit of discovery is always available against anyone whom the plaintiff has a cause of action. In the present case, the court need not decide whether or not the defendant was liable for the same wrong against the plaintiff as that committed by the users with the names of "stemlie" and "kakalily". The question to be answered was whether the defendant facilitated their wrongdoing. (paras 17 & 18)

**(2)** There was evidence on the defendant's website showing a posting expressly inviting users to visit the offending blog and a posting that published accusations against the plaintiff's company. There was also evidence in the plaintiff's affidavit which showed that the defendant's website had terms and

conditions that reserved the defendant's editorial rights that the defendant in its sole discretion could edit or completely remove postings on the website if it so desired without prior notice or explanation. Hence, the defendant by providing and controlling the website that enabled defamatory materials or hyperlinks to be posted freely with no editorial editing clearly facilitated the wrongdoing. (paras 19 & 20)

**(3)** From the facts and circumstances of the case, the defendant was not a mere bystander. The defendant's website featured not a passive hyperlink but an active one that could be actively and independently used by users to visit the said offending blog. By virtue of that active link, the defendant performed an active role in facilitating the wrongdoing. (paras 28 & 29)

**Case(s) referred to:**

*Bunt v. Tilley 3 All ER 336* ***(refd)***

*Byrne v. Deane [1937] 1 KB 818* ***(refd)***

*Godfrey v Demon Internet Ltd QB [1999] 4 All ER 342* ***(refd)***

*Norwich Pharmacal Co v. Customs and Excise Commissioners [1974] AC 133* ***(refd)***

*The New Straits Times Press (Malaysia) Bhd & Ors v. Ahirudin Attan [2008] 8 CLJ 56 HC* ***(dist)***

*Universal City Studios, Inc and Others v. Eric Corley, also known as Emmanuel Goldstein and 2600 Enterprises Inc [2001] US App 111 F Supp 2d* ***(refd)***

*For the plaintiff - Raja Elleen Soraya Raja Aman; M/s Raja Darryl & Loh*
*For the defendant - MK Yee; M/s Shearn Delamore & Co*

*Reported by Usha Thiagarajah*

## JUDGMENT

**Azman Abdullah JC:**

### Introduction

**[1]** This is the plaintiff's application *vide* originating summons (encl. 1) for pre-action discovery against the defendant for defamatory material that was posted on the defendant's website as well as in an external blog which was hyperlinked to the defendant's web forum by two users of the forum who were operating under the pseudonyms 'stemlie' and 'kakalily'. The

plaintiff sought the court to order the disclosure of information that may lead to the identification of the authors of the defamatory postings. Having perused all written submissions filed by both respective parties herein, on 30 January 2008, I granted order in terms in respect of para 1(a) and (b) of encl. 1 with no order as to costs.

## Background

**[2]** The background facts of the case are as follows: the plaintiff is a company listed on the MESDAQ Market of Bursa Malaysia Securities Berhad and carries on the business of regenerative medicine and collects, transports, tests and processes and cryopreserves both umbilical cord blood stem cells from newborns and peripheral blood stem cells from adults.

**[3]** On the other hand, the defendant is the official service provider of the Asian Mom Network which is an online infrastructure provided on a website known as www.meadjohnsonasia.com (hereinafter referred to as 'the defendant's website). Technically, the defendant provides an online forum known as the Asian Mom Network accessible *via* the defendant's website for Asian parents to meet online and exchange thoughts, information and opinions on various issues for the betterment of their healthcare and parenting needs.

**[4]** In this action, the plaintiff contends that two users of the defendant's forum operating under the pseudonyms 'stemlie' and 'kakalily' have posted messages in the forum that provides a link to a separate and external web blog with an address at http://stemlie.wordpress.com ('the said blog) and the said blog contains certain material alleged as being defamatory of the plaintiff.

**[5]** From the facts, it appears that the message posted by 'stemlie' on 20 July 2007 at 3.26pm directs readers to the said blog wherein an article defamatory of the plaintiff states *inter alia* that the plaintiff is a "lying company", a "fraud", is "badly managed" and run by a group of "dubious executives". Whilst the message posted by 'kakalily' on 6 August 2007 at 9.03pm encourages readers to visit the aforesaid blog and referred to the plaintiff as an unscrupulous company.

**[6]** Upon the discovery of the said defamatory postings on the defendant's website, the plaintiff lodged a complaint with the Malaysian Communications and Multimedia Commission on 25 July 2007 and the plaintiff lodged a police report on 30 July 2007 and as to date both actions are still pending.

**[7]** The plaintiff now intends to file defamatory proceedings against the two users namely 'stemlie' and' kakalily' for libel occasioned by the contents of the said blog but the plaintiff does not know their true identities. The plaintiff contends that as the operator of its own website, the defendant has possession of the details of the said individuals as each user must provide details in a form before they can be a registered user of the defendant's website.

**[8]** For this, the plaintiff filed this application for discovery against the defendant, to compel the defendant to disclose the personal information of the two said users of the defendant's forum.

**Court's Opinion**

**[9]** For convenience and clarity, I hereby reproduced the relevant prayers of the originating summons (encl. 1) namely; that the defendant gives disclosure pursuant to the principle established in *Norwich Pharmacal Co v. Customs and Excise Commissioners* [1974] AC 133 to the plaintiff within seven days of the date of the order of the court in affidavit of:

(a) the full names, identity of Mykad registration numbers and email address of 'stemlie' and 'kakalily', who are registered users of the defendant's website 'www.meadjohnson.com' and contributors to the said website's forum, the Asian Mom Network; and

(b) true copies of all documents which are or have been in its possession, custody or power relating to the identity of 'stemlie' and 'kakalily'.

**[10]** It has already been recorded by consent in court on 11 October 2007 that the information set out in para 1(a) of the originating summons (encl. 1) herein as registered with the defendant be deposited with the solicitors for the defendant and accordingly, the defendant's solicitors have already confirmed that the information has been deposited with them.

**[11]** It is submitted that the plaintiff's application filed herein is for discovery against the defendant pursuant to the principles enunciated in the above cited authority wherein the House of Lords held to the effect that:

> Although as a general rule no independent action for discovery would lie against a person whom no reasonable cause of action could be alleged, or was in the position of a mere witness in the strict sense, the rule did not apply where (a) without discovery of the information in the possession of the person against whom discovery was sought no action could be begun against the wrongdoer, and (b) the person against whom discovery was sought had himself, *albeit* through no fault of his own, been involved in the wrongful acts of another so as to facilitate the wrongdoing. In such circumstances, although he might have incurred no personal liability, he was under a duty to assist the person who had been wronged by giving him full information and disclosing the identity of the wrongdoer.

**[12]** It is further submitted that in the essence of the said authority, a plaintiff would be entitled to a discovery order in circumstances where the defendant is in possession of information which if not disclosed may preclude the plaintiff from commencing an action against the wrongdoer and the defendant had facilitated the wrong.

**[13]** In a gist, the defendant opposes this application on the basis of the followings:

(a) the defendant is not the proper party to these proceedings –

> the article complained of was posted on a separate blog and not on the defendant's website. The author of the blog has disclosed her personal e-mail address at stemliemail@gmail.com on the blog itself and the identity of the webhost of the blog at http://wordpress.com is also known.

(b) the defendant has not committed any identifiable wrong against the plaintiff. The defendant is neither the author nor publisher of the blog and the defendant is not involved in the same wrong as the author of the blog;

(c) the application is contrary to public policy as it will cause the defendant to breach its obligations to its users and

(d) the plaintiff has alternative ways to obtain the information sought.

**[14]** Notwithstanding all these, I am satisfied to hold that there are sufficient grounds to make the order as prayed by the plaintiff. As a matter of law, the principles established in the celebrated case of *Norwich Pharmacal* is in the nature of an equitable remedy. Hence, the court ought not to grant an order without clearly identifying that the case at hand falls within the categories of a *Norwich Pharmacal* Order. Therefore, I must say that on the basis of the *Norwich Pharmacal* Test alone, the court has a wide discretion to grant or refuse an order.

**[15]** In this application, much has been made of the contention that the defendant is not the wrongdoer. In this regard, it must be remembered that in reality, the actual wrongdoers are the two users in the defendants website known as 'stemlie' and 'kakalily' solely by virtue of the hyperlink posted by them in the defendant's website inviting and encouraging readers to read the material alleged as being defamatory of the plaintiff. Put simply, the defendant cannot be held liable for the wrong committed by the two users in respect of a separate and external blog found in its website.

**[16]** Be that as it may, it is pertinent to note that the plaintiff intends to file an action in court against the persons behind the said usernames of 'stemlie' and 'kakalily' for libel occasioned by the contents of the separate and external blog but the plaintiff does not know their actual identities.

**[17]** The *Norwich Pharmacal* case allowed a claimant to seek disclosure from any party who had information enabling the claimant to identify a wrongdoer so as to be in a position to bring an action against the wrongdoer where otherwise the claimant would not be able to do so. It may be immediately noted from the case that the benefit of discovery is always available against anyone whom the plaintiff has a cause of action in relation to the same wrong. This was made clear in that case where it was said:

> … discovery to find the identity of a wrongdoer is available against anyone whom the plaintiff has a cause of action in relation to the same wrong.
>
> … They seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortuous acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers.

**[18]** It is, therefore that I come to the conclusion that the court need not decide whether or not the defendant is liable to the same wrong against the plaintiff as that committed by the users with the names of 'stemlie' and 'kakalily'. To my mind, the question to be answered in this case is, did the defendant get mixed up in the acts of others so as to facilitate their wrongdoing.

**[19]** On this issue, I agree with the plaintiff's contention that the defendant can be said to have been involved in the act of the wrongdoers so as to facilitate the wrongdoing. There is evidence in the defendant's website which shows that the defendant's website had a posting that expressly invited users to visit an offending blog (here, the blog is a separate and an external blog hyperlinked from the defendant's forum) and a posting that published accusations against the plaintiff's company.

**[20]** There is also evidence in the plaintiff's affidavit exh. LCJ2 which shows that the defendant's website had terms and conditions that reserved the defendant's editorial rights that the defendant in its sole discretion, edit or completely remove the postings in the website if it so desired without prior notice or explanation. By virtue of that, I am of the opinion that the defendant here by providing and controlling the website that enabled defamatory materials or hyperlinks to have been posted freely with no editorial editing clearly facilitated the wrongdoing.

**[21]** In this respect, it appears that in a recent case decided by Mohd Hishamudin bin Mohd Yunus JC (as he then was) in *The New Straits Times, Press (Malaysia) Bhd & Ors v. Ahirudin Attan* [2008] 8 CLJ 56, the court held that a hyperlink works in the following way. The name/title of the website/weblog B appears on website/weblog A, and the reader can have direct access to website/weblog B simply by clicking on the name/title of website/ weblog B and these so called hyperlinks are usually highlighted by means of color or underlining.

**[22]** Based from my research, in *Universal City Studios, Inc and Others v. Eric Corley, also known as Emmanuel Goldstein and 2600 Enterprises Inc* [2001] U.S. App. 111 F. Supp. 2d at 307; see id at 339 a case decided in the United States of America, held that a hyperlink is also called hypertext link or active link and it is a cross-reference in a distinctive font or color, appearing on one web page that when activated by the point and click of a mouse, brings onto the computer screen another web page. The hyperlink

A can appear on a screen as text, such as the Internet address ("URL") of the web page being called up or a word or phrase that identifies the web page to be called up, or it can appear as an image. Such clicking on the hyperlink instructs the computer to enter the "URL" of the desired web page thereby access that
B page and with a hyperlink on a web page, the linked web site is just one click away.

**[23]** In *Merriam-Webster Online Dictionary 2008*, a hyperlink is defined as an electronic link providing direct access from one
C distinctively marked place in a hypertext or hypermedia document to another in the same or a different document.

**[24]** To my knowledge, a hyperlink is found in web pages. It is a word, phrase or image that computer users can click on to jump to a new document within the current document. Therefore, it
D acts as a reference or navigation element in a document to another section of the same document or to another document on or part of a different domain. Usually, a hyperlink is used to link any unit of information to any other unit of information over the Internet.

E **[25]** Furthermore, a hyperlink that points to a specific page or image on another website is described as a deep link. Thus, an act of placing a hyperlink on a web page that points to a specific page or image within another website, as opposed to linking direct to the main or home page is known as deep linking. The system
F works each time when a computer user activates the link by clicking on it with the mouse, the browser will display the target of the link and open the requested file. In summary, it is an act of using media from another website directly within one's own website as it causes browsers to request the media directly from
G the original web server.

**[26]** Back to the action herein, it is to be noted that in *Godfrey v Demon Internet Ltd QB* [2001]; [1999] 4 All ER 342, it was held that an internet service provider was a publisher at common law
H of the defamatory comments posted on the site by an unknown user or the situation is analogous to that of secretary of a golf club which allowed a defamatory statement to remain on a notice board in *Byrne v. Deane* [1937] 1 KB 818; 2 All ER 204.

I **[27]** However, on the contrary, I find that the *Godfrey*'s case was distinguished in *Bunt v. Tilley* 3 All ER 336; [2006] EWHC 407 (QB). In that case, the court held that an internet service provider that performed no more than a passive role in facilitating postings

on the Internet and did not host the relevant website was not deemed to be a publisher at common law any more than a telephone company would be liable for defamation over the telephone.

**[28]** Nevertheless, from the facts and the circumstances of this case, I come to the conclusion that the defendant is not a mere bystander as it appears to be. This is because the defendant's website featured not a passive hyperlink as held in the *Bunt*'s case but instead a deep link which is an active link as discussed above that can be activated actively and independently by users to visit the said offending blog.

**[29]** By virtue of this active link in the defendant's website, it is my view that the defendant performed an active role in facilitating the wrongdoing. Be that as it may, the case of *The New Straits Times, Press (Malaysia) Bhd & Ors v. Ahirudin Attan (supra)* referred by the defendant in this action is therefore distinguished and for these reasons, I grant order in terms in respect of para 1(a) and (b) of encl. 1 with no order as to costs.